STATE OF MICHIGAN

COURT OF APPEALS

DOROTHY JONES, as Personal Representative of the Estate of DENISE MICHELLE JONES, Deceased,

Plaintiff-Appellant,

v

AARON REYNOLDS, MUSTAPHA ATAT, a/k/a CRAZY MOE MUSTAPHA, a/k/a MOE ATAT, and MARSHA DESIREE HUMPHREY,

Defendants,

and

CITY OF LINCOLN PARK, WILLIAM KISH III, JOSEPH LAVIS, DOUGLAS MUNCEY, and MOHAMED NASSER.

Defendants-Appellees.

UNPUBLISHED
April 7, 2005

No. 250616
Wayne Circuit Court
LC No. 01-143011-NI

Before: Talbot, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Plaintiff, Dorothy Jones, personal representative of the estate of Denise Michelle Jones (hereinafter "decedent"), appeals as of right from a default judgment entered against Aaron Reynolds, Mustapha Atat, and Marsha Desiree Humphrey for $25 million.[1] The default

[1] Reynolds and Atat were the drivers of the vehicles involved in the race leading to decedent's death, and Humphrey owned the vehicle driven by Reynolds. On April 28, 2003, Reynolds plead guilty to charges of involuntary manslaughter, failure to stop at the scene of an accident resulting in death or injury, two counts of felonious driving, and one count of drag racing in Wayne County Circuit Court.

judgment was the final order for the proceeding, and plaintiff's appeal is based on the following orders involving defendants Lincoln Park and Lincoln Park Police Officers William Kish III, Joseph Lavis, Douglas Muncey, and Nasser Mohamed[2]: (1) an order only allowing plaintiff to amend its complaint with state claims, denying plaintiff's motion to compel documents, and setting aside a default entered against defendants; (2) an order granting defendants' motion for summary disposition and denying plaintiff's motion for summary disposition; and (3) an order granting Lincoln Park's motion for summary disposition as to plaintiff's original complaint.

I

At approximately 1:45 a.m. on October 8, 2001, defendant police officers drove to the intersection of Fort Street and Outer Drive, and parked at the Lincoln Park Palace Party Store. Reynolds and Atat had met to drag race and wagers had been made. From the Lincoln Park Palace Party Store defendant police officers observed a large group of people who had gathered across Outer Drive in Detroit. Plaintiff alleges that defendant police officers played rap music over their patrol car's public address system to encourage a drag race, indicated that they would not arrest anyone, and gave the "go ahead" for the race. Reynolds and Atat started northbound on Fort Street. The car driven by Reynolds veered and fatally struck decedent, severing her leg, and injured two other bystanders.

Plaintiff filed a complaint against Reynolds, Humphrey, Atat, and defendants. The circuit court entered some orders staying the proceedings due to the criminal proceedings against defendant police officers.[3] On March 28, 2003, after a hearing, the circuit court granted summary disposition in favor of Lincoln Park, finding that defendant police officers were not the proximate cause of decedent's injuries, as proximate cause is defined in *Robinson v City of Detroit*, 463 Mich 439, 613 NW2d 307 (2000). But the circuit court granted plaintiff's motion to file an amended complaint.

Plaintiff filed its first amended complaint alleging in part: (1) that defendants should be liable for conspiracy to violate MCL 257.626a (the drag racing statute); (2) that defendant police officers should be liable under MCL 691.1407(2)(C); (3) defendants were liable for common law gross negligence based on the wanton and willful conduct of defendant police officers; (4) Lincoln Park was liable under MCL 691.1405; (5) defendants were liable for federal constitutional violations under 42 USC 1983; and (6) defendants were liable for nuisance per se. At a hearing, the circuit court informed plaintiff there could not be any federal claims in the amended complaint because of time issues, thus, restricting the amended complaint. Subsequently, the trial court ordered that: (1) plaintiff be permitted to file an amended complaint

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[2] Throughout this opinion Lincoln Park, Kish, Lavis, Muncey, and Nasser will collectively be referred to as defendants, singularly Lincoln Park will be referred to by name, and Kish, Lavis, Muncey, and Mohamed will collectively be referred to as "defendant police officers" and individually by name.

[3] On March 3, 2003, Officers Nasser, Muncey, and Lavis entered a plea of no contest to neglect of duty, and all charges were dismissed against Kish.

alleging state law claims against defendants; (2) plaintiff's federal claims be stricken and withheld from filing until the state claims are heard; (3) the defaults entered against defendants be set aside; and (4) plaintiff's motion to compel Lincoln Park to produce documents and things is denied. Plaintiff filed an amended complaint per the circuit court order to only include state law claims, which changed the last complaint only by removing the federal claims. Another hearing was conducted on a motion for summary disposition filed by defendants' and plaintiff. The circuit court did not think that nuisance per se was one of the exceptions to governmental immunity and again noted that defendant police officers were not the proximate cause of decedent's injuries, thus, granted defendants' motions for summary disposition and denied plaintiff's motion for summary disposition.

II

Plaintiff argues, on appeal, that governmental immunity under MCL 691.1407(2)(c), as interpreted by *Robinson, supra*, illegally provides immunity to government employees giving them a vehicle to conspire to immunize themselves. We disagree.

Plaintiff failed to present this issue to the trial court. Generally, constitutional challenges to a statute may not be raised for the first time on appeal. *Brookdale Cemetery Ass'n v Lewis*, 342 Mich 14, 18; 69 NW2d 176 (1955); *Lumber Village, Inc v Siegler*, 135 Mich App 685, 692; 355 NW2d 654 (1984). In addition, plaintiff has not properly presented the issue on appeal. It is difficult to ascertain what plaintiff's exact argument is with regard to this issue. Seemingly, plaintiff is challenging the constitutionality of the Michigan Supreme Court's interpretation of the governmental immunity statute in *Robinson, supra*, because it does not account for conspiracy like 42 USC 1985.[4] Plaintiff provides no support for why Michigan's governmental immunity statute must take conspiracy into account. To properly present an appeal, an appellant must appropriately argue the merits of the issues she identifies in her statement of the questions involved. *Richmond Twp v Erbes*, 195 Mich App 210, 220; 489 NW2d 504 (1992), overruled in part on other grounds in *Bechtold v Morris*, 443 Mich 105; 503 NW2d 654 (1993). The appellant may not merely announce her position and leave it to this Court to discover and rationalize the basis for her claims, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Ambs v Kalamazoo County Road Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003), nor may she give issues cursory treatment with little or no citation of supporting authority, *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984), *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). Argument must be supported by citation to appropriate authority or policy. MCR 7.212(C)(7), *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). An appellant's failure to properly address the merits of her

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[4] "In order to establish a claim under 42 USC 1985(3) plaintiffs must prove: (1) the existence of a conspiracy, (2) intent to deny plaintiffs the equal protection of the laws or of equal privileges and immunities under the laws, (3) injury or deprivation of a federally protected right of plaintiffs, (4) an overt act in furtherance of the object of the conspiracy, and (5) some racial or other class-based invidiously discriminatory animus behind the conspirators' actions." *Mitchell v Cole*, 176 Mich App 200; 439 NW2d 319 (1989) citing *Griffin v Breckenridge*, 403 US 88, 102-103; 91 S Ct 1790; 29 L Ed 2d 338 (1971).

assertion of error constitutes abandonment of the issue. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Thus, plaintiff has abandoned this issue on appeal.

Nonetheless, this argument is without merit. This Court and the Michigan Supreme Court have found that MCL 691.1407 is not unconstitutional on numerous occasions, *McCann v State of Michigan*, 398 Mich 65, 77, 80; 247 NW2d 521 (1976), Ryan, J., concurring; *Pittman v City of Taylor*, 398 Mich 41; 247 NW2d 512 (1976); *Allen v Dep't of Mental Health*, 79 Mich App 170; 261 NW2d 247 (1977); *Wojtasinski v Saginaw*, 74 Mich App 476, 254 NW2d 71 (1977). Michigan's governmental immunity statute is not in conflict with 42 USC 1985, and Michigan's governmental immunity statute does not prevent plaintiff from bringing a federal 42 USC 1985 claim, instead, only limits plaintiff's ability to bring state tort claims. See *Borg-Warner Acceptance Corp v Dep't of State*, 433 Mich 16, 19; 444 NW2d 786 (1989); *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 647-648; 363 NW2d 641 (1984). Plaintiff may bring suit against a municipality pursuant to 42 USC 1985, thus, plaintiff's contention is without merit. See *Jones v Powell*, 462 Mich 329, 336-337; 612 NW2d 423 (2000).

Plaintiff's remaining contentions seem to be based on policy. Where the language of a statute is clear, it is not the role of the judiciary to second-guess a legislative policy choice; a court's constitutional obligation is to interpret, not rewrite, the law. See *Hanson v Bd of Co Rd Comm'rs of Mecosta Co*, 465 Mich 492, 504; 638 NW2d 396 (2002). A court's function in interpreting a statute is not "to independently assess what would be most fair or just or best public policy," but "to discern the intent of the Legislature from the language of the statute it enacts." *Id.* The Supreme Court has clarified how MCL 691.1407 is to be applied in *Robinson, supra*, and this Court is bound to follow our Supreme Court's decisions. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993); *Lopez v General Motors Corp*, 224 Mich App 618, 630; 569 NW2d 861 (1997). For the above reasons, plaintiff has not properly presented this argument on appeal and the argument is without merit.

III

Plaintiff's next issue on appeal is that the trial court erred in granting defendants' motions for summary disposition pursuant to governmental immunity and denying plaintiff's motion for summary disposition where defendant police officers were grossly negligent and the proximate cause of decedent's injuries. We disagree.

A. Standard of Review

This Court reviews decisions on motions for summary disposition de novo. *Roberts v Mecosta Co Gen Hosp (After remand)*, 470 Mich 679, 685; 684 NW2d 711 (2004). Apparently, the circuit court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7), which permits summary disposition where a claim is barred by governmental immunity. In evaluating whether summary disposition should have been granted under MCR 2.116(C)(7), this Court "considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001); MCR 2.116(G)(5). Summary disposition should not be granted unless no factual development could

provide a basis for recovery. *Simmons v Apex Drug Stores*, 201 Mich App 250, 252; 506 NW2d 562 (1993).

Plaintiff's cross motion requested summary disposition pursuant to MCR 2.116(C)(9) and (10). MCR 2.116(C)(9) provides that a motion for summary disposition may be raised on the ground that the opposing party has failed to state a valid defense to the claim asserted against him. The motion tests the sufficiency of a defendant's pleadings alone, and all well-pled allegations are accepted as true. *Allstate Ins Co v Morton*, 254 Mich App 418, 421; 657 NW2d 181 (2002). Summary disposition is proper if the defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff's right to recovery. *Id*. at 421. Under MCR 2.116(C)(10), a party may move for dismissal of a claim based on the assertion that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. The motion tests the factual support for a claim, and when reviewing the motion, the court must consider all of the documentary evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

B. Proximate Cause

The circuit court granted defendants' motions for summary disposition and denied plaintiff's motion for summary disposition finding that defendants were immune under MCL 691.1407 because defendant police officers' conduct was not the proximate cause of decedent's injuries. We find that summary disposition was properly entered in favor of defendants based on governmental immunity under MCL 691.1407(2) because defendant police officers were not "the" proximate cause of decedent's injuries. Because defendants stated a valid defense and plaintiff is not entitled to judgment as a matter of law, plaintiff's motion for summary disposition was properly denied pursuant to MCR 2.116(C)(9) and (10).

MCL 691.1407(2) provides:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service . . . if all of the following are met:
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> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Whether a governmental employee was acting within the course of his employment depends on the existence of an employment relationship and the circumstances of the work environment created by the relationship, including the temporal and spatial boundaries established. *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 407-409; 605 NW2d 690 (1999). And, whether the employee was acting within the scope of his authority depends on the reasonable power delegated to him to accomplish the business of his employer under the circumstances. *Id.*

There appears to be no dispute that defendant police officers were within the course of their employment and within the scope of their authority. The dispute is whether defendant police officers were the proximate cause of decedent's injuries. The circuit court granted summary disposition finding that defendant police officers were not the proximate cause of decedent's injuries and death. Plaintiff argues that the gross negligence of defendant police officers was the proximate cause of decedent's injuries because it was part of a chain that was not broken.

Governmental employees are immune from liability for injuries they cause during the course of their employment if they are acting within the scope of their authority, if they are engaged in the discharge of a governmental function, and if their "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." *Robinson, supra* at 462. To be the proximate cause of an injury, gross negligence of a government employee that subjects him to liability must be "the one most immediate, efficient and direct cause" preceding the injury. *Id.*; *Tarlea v Crabtree*, 263 Mich App 80, 92; 687 NW2d 333 (2004) (finding that the defendants' conduct was not the proximate cause of the plaintiff's death due in part to heat stroke where the plaintiff had the option to not participate in a football-camp run or to stop and rest during the run). In *Robinson, supra* at 462, our Supreme Court provided:

> [R]ecognizing that "the" is a definite article, and "cause" is a singular noun, it is clear that the phrase "the proximate cause" contemplates *one* cause. Yet, meaning must also be given to the adjective "proximate" when juxtaposed between "the" and "cause" as it is here. We are helped by the fact that this Court long ago defined "the proximate cause" as "the immediate efficient, direct cause preceding the injury." *Stoll v Laubengayer*, 174 Mich 701, 706; 140 NW 532 (1913). The Legislature has nowhere abrogated this, and thus we conclude that in MCL 691.1407(2)(c); MSA 3.996(107)(2)(c) the Legislature provided tort immunity for employees of governmental agencies unless the employee's conduct amounts to gross negligence that is the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause.

Reynolds and Atat were racing vehicles and accelerating at a high speed when the vehicle driven by Reynolds veered off into a crowd of onlookers and hit decedent, severing her leg, causing her to bleed to death. In a light most favorable to plaintiff, defendant police officers sanctioned and condoned the race and played rap music over the public address system of their police vehicles to encourage a competitive atmosphere. Plaintiff argues that defendant police officers' overt actions were the proximate cause because the race would not have occurred but for defendant police officers' overt actions, which were all a part of one chain of events.

Applying the *Robinson* standard, in this case, the impact of the vehicle driven by Reynolds with decedent's body was "the one most immediate, efficient and direct cause" of

decedent's injuries and death. See *Curtis v Flint*, 253 Mich App 555, 563; 655 NW2d 791 (2002). Clearly, the one most immediate, efficient, and direct cause of decedent's death was Reynolds' vehicle striking decedent. Defendant police officers' conduct, assuming gross negligence**,** while a cause of decedent's death, it was but one cause, and was therefore, not "the one most immediate, efficient, and direct cause" as required by *Robinson*. *Id*. The second most direct cause would be decedent gathering at the particular location. Even if plaintiff had established the necessary level of negligence, the claims against defendant police officers were factually insufficient to overcome immunity because defendant police officers were not the proximate cause of decedent's injuries or death. See *Curtis, supra* at 563. As such, Lincoln Park is not vicariously liable.

For the above reasons, the circuit court did not err in granting defendants' motion for summary disposition based on the fact that defendants were not "the" proximate cause of decedent's death, and denying plaintiff's motion for summary disposition when defendants stated valid defenses and plaintiff was not entitled to judgment as a matter of law. Because the alleged actions and inactions of defendant police officers were not "the" proximate cause of decedent's injuries or death, it is unnecessary to address whether defendant police officers were grossly negligent. See *Robinson, supra*.

C. Willful and Wanton Misconduct

Plaintiff also argues that she has alleged willful and wanton misconduct in addition to gross negligence, and that in order to establish a claim only needs to show that defendant police officers were "a" proximate cause. However, plaintiff has provided no relevant support for this argument and we have found no support for the argument.

Plaintiff does not raise the willful or wanton issue in the statement of questions presented. The appellant must identify her issues in her brief in the statement of questions presented. MCR 7.212(C)(5), *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999). Ordinarily, no point will be considered which is not set forth in the statement of questions presented. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). Further, plaintiff has not presented any support for the contention that willful and wanton conduct is an exception from governmental immunity that only requires a showing of "a" proximate cause. Plaintiff cites *Gibbard v Cursan*, 225 Mich 311; 196 NW 328 (1923) (nongovernmental negligence case describing instructions for contributory negligence) and *Burnett v Adrian*, 414 Mich 448; 326 NW2d 810 (1982) (regarding a recreational use law that authorized recovery for gross negligence or will and wanton conduct), neither applying willful misconduct as an exception to governmental immunity. To properly present an appeal, an appellant must appropriately argue the merits of the issues she identifies in her statement of the questions involved. *Richmond Twp, supra* at 220. The appellant may not merely announce her position and leave it to this Court to discover and rationalize the basis for her claims, *Wilson, supra* at 243; *Ambs, supra* at 650, nor may she give issues cursory treatment with little or no citation of supporting authority, *Goolsby, supra* at 655 n 1; *Silver Creek Twp, supra* at 99. Argument must be supported by citation to appropriate authority or policy. MCR 7.212(C)(7), *Peterson Novelties, Inc, supra* at 14. An appellant's failure to properly address the merits of her assertion of error constitutes abandonment of the issue. *Yee, supra* at 406.

Regardless, we have found no authority supporting plaintiff's contention that when willful and wanton conduct is involved defendants only need to be "a" proximate cause. We have found no such exception to governmental immunity. To the contrary, in *Young v Robin*, 122 Mich App 84, 87; 329 NW2d 430 (1982), this Court held that "We need not address the defendants' contention that the trial court erred in finding that there existed a genuine issue of fact as to whether the state troopers were guilty of willful and wanton misconduct, since conduct falling short of an intentionally wrongful act is not an exception to governmental immunity." Thus, this claim was not even a valid exception to governmental immunity prior to the July 1986 amendments to MCL 691.1407. See *Sudul v Hamtramck*, 221 Mich App 455, 458 (Corrigan, J.), 480-481 (Murphy, J.); 562 NW2d 478 (1997).

We find that plaintiff has abandoned her argument with regard to willful and wanton conduct, and the argument is without merit.

D. Nuisance Per Se

Plaintiff contends that her motion for summary disposition should have been granted and Lincoln Park's denied based on nuisance per se. The circuit court found that Lincoln Park was immune from a nuisance per se claim. We find that plaintiff has failed to present a question of fact constituting a nuisance per se because a car racing is not a nuisance at all times, without regard to the care with which it is conducted.

Generally, governmental agencies are granted statutory immunity from tort liability unless otherwise provided in the act. MCL 691.1401 et seq; see also *Haaksma v Grand Rapids*, 247 Mich App 44, 52; 634 NW2d 390 (2001). However, it is not clear whether nuisance per se is firmly recognized as an exception to governmental immunity. See *(Li v Feldt After Second Remand)*, 439 Mich 457, 477; 487 NW2d 127 (1992), overruled on other grounds by *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002) (where the Supreme Court commented that "regardless of whether nuisance per se might qualify as an exception to governmental immunity," the plaintiffs in the cases before it did not present nuisance per se claims); *McDowell v Detroit*, 264 Mich App 337, 346-347; 690 NW2d (2004). Nonetheless, even if nuisance per se is a recognized exception plaintiff has, nevertheless, failed to establish facts amounting to a nuisance per se.

This Court in *McDowell, supra*, recently provided the following with regard to nuisance per se:

> "[A] nuisance per se is an activity or condition which constitutes a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained." *Li v Feldt (After Second Remand)*, 439 Mich 457, 476-477; 487 NW2d 127 (1992)(opinion by Cavanagh, C.J.). In order to meet the definition of a nuisance per se, the condition must be unreasonable by its very nature and must not be predicated on a lack of care. *Id*. at 477. Pursuant to this definition, our Supreme Court has stated that neither an improperly timed traffic light nor the maintenance of a holding pond could be considered "an intrinsically unreasonable or dangerous activity, without regard for care or circumstances . . . [because] both activities serve obvious and beneficial public purposes and are

> clearly capable of being conducted in such a way as not to pose any nuisance at all." *Id.*

A nuisance per se is not predicated on the want of care, but is unreasonable by its very nature. *Li, supra* at 477.

In the present case, a drag race was at issue. Plaintiff relies upon the following deposition testimony of Lincoln Park Police Chief Kish:

> *Q.* If the facts show in this case that there were two Mustangs that were designed for drag racing, propelled by nitrous oxide, on a public street, would you consider that to be a dangerous activity at all times, under any circumstances?
>
> *A.* Yes.
>
> *Q.* Similarly, using those types of vehicles on a public street that I've described, would you consider that to be an inherently dangerous activity?
>
> *A.* Yes.
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> * * *
>
> *Q.* Would you agree that drag racing two Mustangs modified to consume nitrous oxide, as the evidence will show in this case, on a public street, is an intrinsically unreasonably dangerous activity without regard for care or circumstances?
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> * * *
>
> *A.* Yes.

Plaintiff contends that Lincoln Park, based on the testimony of Chief Kish, acknowledges that drag racing is a nuisance per se.

We find that a nuisance per se does not exist in this case. Plaintiff contends that a nuisance per se exists because "conducting a race on October 7, 2001, at approximately 1:30 A.M., in the morning, when most people are presumably asleep, this 'drag race' activity being conducted on a public [s]treet, in a residential neighborhood," and then listed other factors specific to the race. Certainly, driving and racing can be conducted in a manner that is safe. Under the present circumstances the race was not conducted in a safe manner, but races are conducted professionally all of the time and are maintained and conducted in a manner that is not a nuisance under all circumstances. This Court is to review the activity to determine if it is a nuisance at all times no matter the care or how it is maintained. A race certainly can be envisioned which is not a nuisance and can be conducted and maintained in a manner that does not cause a nuisance. Plaintiff's claim is predicated on lack of care. And, racing is not an intrinsically unreasonable or dangerous activity. The questioning of Chief Kish in the deposition presents a question based on a specific situation in which proper care may not have been taken. In addition, Chief Kish would not be able to make legal conclusions as to what a nuisance per se is. Racing is not "an intrinsically unreasonable or dangerous activity." *Li, supra* at 477 (opinion

by Cavanagh, C.J.). Obviously with proper care and concern, racing can be conducted in a manner that does not pose a nuisance at all times and under all circumstances.

For the above reasons, plaintiff has failed to present a question of fact constituting a nuisance per se because a car racing is not a nuisance at all times, without regard to the care with which it is conducted, thus, the circuit court properly granted Lincoln Park's motion for summary disposition[5] and denied plaintiff's motion for summary disposition.

E. Motor Vehicle Exception to Governmental Immunity

Plaintiff's next argues that the trial court erred in granting Lincoln Park's motion for summary disposition pursuant to MCL 691.1405 and denying plaintiff's motion for summary disposition where Lincoln Park was not entitled to governmental immunity because of the motor vehicle exception to governmental immunity. We disagree. The determination whether a vehicle is a motor vehicle within the scope of the exception to governmental immunity is an issue of statutory construction subject to de novo consideration on appeal. *Stanton v Battle Creek*, 466 Mich 611, 614-615; 647 NW2d 508 (2002).

The trial court properly granted Lincoln Park's motion for summary disposition and denied plaintiff's motion for summary disposition because the Lincoln Park police vehicles were not being operated within the meaning of MCL 691.1405; i.e., decedent's injuries and death were not directly associated with the operation of the Lincoln Park police vehicles.

The motor vehicle exception of the governmental immunity act, MCL 691.1405, provides:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948.

Plaintiff contends that Lincoln Park's answer to her requests for admissions establishes that defendant police officers' vehicles were operated in a manner excepting Lincoln Park from governmental immunity. Lincoln Park in its answers to plaintiff's requests for admissions, admitted that defendant police officers operated and occupied Lincoln Park vehicles during the drag race, these vehicles were parked at a Lincoln Park party store near the drag race, and that defendant officers were within the scope of their employment during the drag race. Plaintiff argues that Lincoln Park police cars hyped the crowd and that, although the lights were off, the

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[5] Even if the circuit court improperly decided the motion based on governmental immunity (as it indicated that governmental immunity did not provide an exception for nuisance per se, which is not clear), "[a] trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Michigan Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

engines were running. Plaintiff also argues that the police vehicles were being operated in violation of the drag racing statute MCL 257.626a because the vehicles were rendering assistance to the race. Plaintiff relying on *Nolan v Bronson*, 185 Mich App 163; 460 NW2d 284 (1990), argues that the vehicle does not have to be moving and can support application of governmental immunity under the current facts because all that is necessary is that the vehicle is "'being used or employed in some specific function or to produce some desired work or effect.'" *Nolan, supra* at 177.

Recently, in addressing nearly the exact same argument in *Poppen v Tovey*, 256 Mich App 351, 355-356; 664 NW2d 269 (2003), this Court provided:

> Citing *Wells v Dep't of Corrections*, 79 Mich App 166; 261 NW2d 245 (1977) and *Nolan v Bronson*, 185 Mich App 163; 460 NW2d 284 (1990), plaintiff argues that for purposes of the motor-vehicle exception it is not necessary that a vehicle be in motion at the time of the injury to find that the injury resulted from "operation" of a motor vehicle. Rather, all that is necessary is that the vehicle is "'being used or employed in some specific function or to produce some desired work or effect.'" *Nolan*, 185 Mich App at 177, quoting *Wells*, 79 Mich App at 169. Our Supreme Court, however, recently rejected this expansive definition of "operation" in *Chandler v Muskegon Co*, 467 Mich 315; 652 NW2d 224 (2002), determining that such a construction defines the term "so broadly that it could apply to virtually any situation imaginable in which a motor vehicle is involved regardless of the nature of its involvement." *Id*. at 321. Noting the well-established principle that the statutory exceptions to governmental immunity must be narrowly construed, the Court concluded that the phrase "'operation of a motor vehicle' means that the motor vehicle is being operated as a motor vehicle" and, therefore, encompasses only those "activities that are directly associated with the driving of a motor vehicle." *Id*. at 320-321 (emphasis in original). Applying this definition to the undisputed facts of this case, we find no error in the trial court's conclusion that plaintiff's injuries did not result from "operation" of a government-owned motor vehicle. At the time of the collision, the city vehicle had been stopped for approximately three to five minutes in order to permit its passenger to inspect a public utility. Once stopped for this purpose, its presence on the road was no longer "directly associated with the driving" of that vehicle. *Id*. at 321. Accordingly, the vehicle was not being operated "as" a motor vehicle at the time of the accident and summary disposition in favor of the city was appropriate.

Thus, the mere involvement of a motor vehicle is not sufficient to abrogate immunity. Rather, the negligent operation of a vehicle requires that the motor vehicle was being operated as a motor vehicle, and the exception encompasses only activities which are directly associated with the driving of a motor vehicle. See *Chandler, supra* at 320-32; *Poppen, supra* at 355. To result from the negligent operation of a motor vehicle, generally an injury must result from physical contact between the government-owned vehicle and the plaintiff's vehicle, or from circumstances in which the government-owned vehicle physically forced the plaintiff's vehicle off the road or into another object. See *Robinson, supra* at 457; *Curtis, supra* at 559.

Clearly, the Lincoln Park vehicles were not being operated "as a motor vehicle," as statutorily defined and interpreted by this Court and the Supreme Court. It is undisputed the vehicles were not moving, and, at most, were being used through their public address systems. There was no physical contact between decedent and the Lincoln Park police vehicles; nor was any activity of the Lincoln Park police vehicles directly associated with the driving of a motor vehicle. The circuit court properly granted Lincoln Park's motion for summary disposition in this regard and properly denied plaintiff's motion for summary disposition because decedent's injuries did not result from the negligent operation of Lincoln Park police vehicles.

IV

Plaintiff next contends, on appeal, that the trial court abused its discretion by setting aside the entry of default against defendants. We disagree.

A. Standard of Review

The application and construction of court rules is an issue of law subject to de novo review. *Barclay v Crown Bldg & Development, Inc*, 241 Mich App 639, 642; 617 NW2d 373 (2000). Whether a default or a default judgment should be set aside is within the sound discretion of the trial court, and this Court reviews a trial court's decision to set aside a default or default judgment for a clear abuse of discretion. *Amoco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 97; 666 NW2d 623 (2003). "An abuse of discretion involves far more than a difference in judicial opinion." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). A trial court abuses its discretion when "the result is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias.'" *Id*., quoting *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985). Where there has been a valid exercise of discretion, appellate review is sharply limited. *Id*.

B. Setting Aside a Default

Plaintiff contends that defendants never filed answers to plaintiff's amended complaint filed on March 31, 2003 or at least did not answer within the proper time period established by the fact that the default needed to be set aside. Plaintiff further contends that the trial court abused its discretion in setting aside the default. We find that the circuit court did not clearly abuse its discretion in setting aside the default entered against defendants.

A motion to set aside a default or a default judgment generally may be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1); *Alken-Ziegler, supra* at 223. Whether a party has made a sufficient showing of good cause and of a meritorious defense are discrete inquiries, but the strength of a proffered meritorious defense can affect the necessary showing of good cause. *Alken-Ziegler, supra* at 232-233. Good cause sufficient to warrant setting aside a default or a default judgment may be shown by: (1) a substantial irregularity or defect was present in the proceeding on which the default is based; or (2) there was a reasonable excuse for failure to comply with the requirements that created the default. *Id*. at 233; see also *Amoco Builders & Developers, Inc*,

supra. A substantial defect or irregularity must have prejudiced the defendant to constitute good cause. *Alycekay Co v Hasko Construction Co*, 180 Mich App 502, 506-507; 448 NW2d 43 (1989); *Emmons v Emmons*, 136 Mich App 157, 164-165; 355 NW2d 898 (1984). The policy of this state generally favors the meritorious determination of issues, but once regularly entered, default judgments should stand after expiration of the time provided. *Amco Builders & Developers, Inc, supra* at 95; *Alken-Ziegler, supra* at 227; *Koski v Allstate Ins Co*, 456 Mich 439, 447; 572 NW2d 636 (1998); *Wendel v Swanberg*, 384 Mich 468, 476; 185 NW2d 348 (1971).

1. Defendant Police Officers

Plaintiff filed an amended complaint on March 31, 2003. On April 17, 2003, defendant police officers filed a motion to set aside the order granting leave to amend complaint and to strike the amended complaint. MCR 2.603 provides for entry of a default "[if] a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules." Plaintiff entered the default based on defendants' failure to comply with MCR 2.108. MCR 2.108(A)(1) provides: "A defendant must serve and file an answer or take other action permitted by law or these rules within 21 days after being served with the summons and a copy of the complaint in Michigan in the manner provided in MCR 2.108(A)(1)." MCR 2.108(B) provides: "A motion raising a defense or an objection to a pleading must be served and filed within the time for filing the responsive pleading or, if no responsive pleading is required, within 21 days after service of the pleading to which the motion is directed." MCR 2.108(C)(3) provides: "The response to a supplemental pleading or to a pleading amended either as of right or by leave of court must be served and filed within the time remaining for response to the original pleading or within 21 days after service of the supplemental or amended pleading, whichever period is longer."

Defendant police officers filed the motion to strike the amended complaint and motion to set aside the amended complaint within the proper time period pursuant to MCR 2.108(B), and this is consistent with the "otherwise defend" language of MCR 2.603, thus, entry of the default was improper. In *Alken-Ziegler, supra* at 229, our Supreme Court noted:

> . . . although the law favors the determination of claims on the merits, . . . it also has been said that the policy of this state is generally against setting aside defaults and default judgments that have been *properly entered*. [Citations omitted and emphasis added.]

Thus, the policy is not against setting aside defaults that have not been properly entered. Defendant police officers did *otherwise defend*, thus, entry of the default was improper. Nonetheless, even if the default was properly entered, the circuit court did not clearly abuse its discretion in setting aside the default against defendant police officers.

Defendant police officers' motion and objection to the amended pleading and the record support that there were substantial procedural irregularities, thus, defendant police officers have shown "good cause." On March 14, 2003, plaintiff brought a motion for leave to file an amended complaint and attached the amended complaint. Subsequently, on March 27, 2003, defendant police officers filed a motion for summary disposition contending that summary disposition was proper on plaintiff's original complaint and the proposed first amended complaint attached to the March 14, 2003, motion to amend. On March 28, 2003, there was a

hearing on Lincoln Park's motion for summary disposition and the circuit court indicated that plaintiff could file the amended complaint. Then, on March 31, 2003, plaintiff filed the first amended complaint, which differed from the amended complaint presented at the hearing. The amended complaint also contained claims that the circuit court had already granted summary disposition on and federal claims which were later stricken. Further, defendant police officers provided plaintiff with a meritorious defense before the first amended complaint filed, which also supported a complete defense for defendant police officers for the claims in the amended complaint (noting that the federal claims were stricken from her first amended complaint). Moreover, defendant acknowledged at the April 25, 2003 hearing that there were no new state claims against defendant police officers in the amended complaint, and the federal claims were stricken. Thus, defendants' response to plaintiff's original complaint addressed all of the claims against defendant police officers that were valid. It is clear defendant police officers' prior response adequately provided a meritorious defense to the amended complaint raising no new proper claims against defendant police officers. [6]

Even, if defendant police officers were somewhat negligent, "[t]he mere existence of negligence does not preclude a finding of good cause." *Huggins v Bohman*, 228 Mich App 84, 88; 578 NW2d 326 (1998). Indeed, the first of the five specific grounds for providing relief from a judgment is "mistake, inadvertence, surprise, or excusable neglect . . . ." MCR 2.612(C)(1)(a). Defaults and default judgments may also be set aside under the standards of MCR 2.612, pertaining to relief from judgment. MCR 2.603(D)(3); *Alken-Ziegle, supra* at 234 n 7. As noted, "[a] showing of a meritorious defense and factual issues for trial can fulfill the 'good cause' requirement because in some situations, allowing such a default to stand would result in manifest injustice." *Huggins, supra* at 88, citing *Park v American Casualty Ins Co*, 219 Mich App 62, 67; 555 NW2d 720 (1996). Finally, relief from judgment rule authorizes relief for "any other reason justifying relief from the operation of judgment." MCR 2.612(C)(1)(f). This catchall provision grants a trial court wide discretion to set aside a default if it determines that manifest injustice might flow from the entry of a default judgment.

For the above reasons, we find that the trial court did not commit a clear abuse of discretion in setting aside the default entered against defendant police officers.

2. Lincoln Park

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[6] A specific affidavit of meritorious defense is not required when it is clear from the record that defendants had presented a meritorious defense. See *ISB Sales Co, supra* at 533-544; *Jones v Philip Atkins Construction Co*, 143 Mich App 150, 161; 371 NW2d 508 (1985); see also *Hertz Schram & Saretsky v Turner*, unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 239176, issued January 20, 2004); *Francis v Yelle*, unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 237406, issued May 29, 2003). We note these unpublished opinion as persuasive, because of the limited case law, but notes that unpublished opinions are not binding under the rules of stare decisis. MCR 7.215(C)(1); see also *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2003).

Although, a closer question, the circuit court did not clearly abuse its discretion in setting aside the default entered against Lincoln Park.

At a March 28, 2003 hearing the circuit court indicated that it was granting Lincoln Park's motion for summary disposition because of governmental immunity. And, the circuit court at this same hearing indicated that plaintiff could amend the complaint. At this hearing, Lincoln Park addressed plaintiff's submitted amended complaint and contended that it did not matter because it was still entitled to governmental immunity pursuant to *Robinson, supra*. There were three versions of the amended complaint presented prior to entry of the default judgment: (1) March 14, 2003, plaintiff presented one version with her motion for leave to amend; (2) on March 28, 2003, at the hearing plaintiff presented another version of the amended complaint and was granted leave to amend; and (3) on March 31, 2003, plaintiff filed yet another version of the amended complaint, which subsequently had claims stricken from it. The amended complaint, filed on March 31, 2003, which Lincoln Park did not respond to, was later found to be improper. On April 25, 2002, a hearing was conducted and it appears that both Lincoln Park and the circuit court were confused as to whether Lincoln Park was still a party to the proceedings, since the circuit court had earlier granted its motion for summary disposition. The new complaint contained the former allegations that the circuit court had already granted summary disposition on and new claims for nuisance per se and federal claims. There were questions throughout the hearing regarding the filing of the complaint. The circuit court ordered that the federal law claims contained in the amended complaint were to be stricken and for plaintiff to file another amended complaint without the federal claims.

The was a substantial number of irregularities and defects in the proceedings below regarding plaintiff's amended complaint, thus, there was "good cause" to set aside the default against Lincoln Park. *Alken-Ziegler, supra* at 233; *Barclay, supra* at 653. Lincoln Park presented a defense based on governmental immunity in its original pleadings, which carried over to the amended pleadings. These arguments also covered plaintiff's addition of the nuisance per se claim, in which, the complaint itself was lacking because racing is not a nuisance per se. And, Lincoln Park presented a meritorious defense at the hearing where plaintiff argued her motion to amend when it argued that it was still entitled to governmental immunity on the claims presented in the amended complaint.[7]

Even if Lincoln Park was somewhat negligent, "[t]he mere existence of negligence does not preclude a finding of good cause." *Huggins, supra* at 88. Indeed, the first of the five specific grounds for providing relief from a judgment is "mistake, inadvertence, surprise, or excusable neglect . . . ." MCR 2.612(C)(1)(a). Defaults and default judgments may also be set aside under the standards of MCR 2.612, pertaining to relief from judgment. MCR 2.603(D)(3); *Alken-Ziegler, supra* at 234 n 7. As noted, "[a] showing of a meritorious defense and factual issues for trial can fulfill the 'good cause' requirement because in some situations, allowing such a default

[7] As noted above, a specific affidavit of meritorious defense is not required when it is clear from the record that defendants had presented a meritorious defense. See *ISB Sales Co, supra* at 533-544; *Jones, supra* at 161; see also *Hertz Schram & Saretsky, supra v Turner*; *Francis, supra.*

to stand would result in manifest injustice." *Huggins, supra* at 88, citing *Park, supra* at 67. Finally, the relief from judgment rule authorizes relief for "any other reason justifying relief from the operation of judgment." MCR 2.612(C)(1)(f). This catchall provision grants a trial court wide discretion to set aside a default if it determines that manifest injustice might flow from the entry of a default judgment. Manifest injustice would result if the default was not set aside as Lincoln Park, would be liable to plaintiff for claims for which it is immune.

For the above reasons, it was not a clear abuse of discretion for the circuit court to find that Lincoln Park satisfied the good cause prong of the analysis, even if it was negligent in responding to the first amended complaint, as it thought it was dismissed from the case. This lesser showing of good cause is sufficient when, as seen in this case, a manifest injustice could result from the default judgment in light of the existence of a meritorious defense. The circuit court's decision to set aside the default was not palpably and grossly violative of fact and logic. See *Alken-Ziegler, supra* at 227.

V

Plaintiff next argues, on appeal, that the trial court abused its discretion in denying plaintiff's motion to compel production of relevant documents from Lincoln Park. We disagree.

A. Standard of Review

A motion to compel discovery is a matter within the trial court's discretion, and the court's decision to grant or deny a discovery motion will be reversed only if there has been abuse of that discretion. *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 343; 497 NW2d 585 (1993). In civil cases, an abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transp v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000). Michigan law generally provides for the discovery of any relevant, nonprivileged matter. MCR 2.302(B)(1); *Eyde v Eyde*, 172 Mich App 49, 54-55; 431 NW2d 459 (1988).

B. Motion to Compel Production of Documents

Plaintiff contends that the circuit court abused its discretion in denying plaintiff's motion to compel production of documents against Lincoln Park, particularly, when the original request was submitted before Lincoln Park was dismissed from the case. It does not appear that the circuit court abused its discretion, but, regardless, any error was clearly harmless. Plaintiff's brief on appeal does not specifically address what documents it wanted, but indicated the production of documents were "relevant to find impeachment evidence." However, in granting summary disposition in favor of defendants the circuit court viewed all evidence in a light most favorable to plaintiff, thus, the admission of impeachment evidence would not have changed anything. Consequently, any error was harmless error and plaintiff's substantial rights were not affected. See *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004); *Campbell v Sullins*, 257 Mich App 179, 197; 667 NW2d 887 (2003); MRE 103(a); MCR 2.613(A). As such, even if the circuit court did abuse its discretion (which it does not seem that it did), plaintiff is entitled to no relief on this issue.

VI

Plaintiff's final issue on appeal is that the trial court abused its discretion in striking and withholding from filing the federal civil rights claims where the motion to file an amended complaint was stipulated to and granted by the circuit court. We disagree because the circuit court did not abuse its discretion in restricting plaintiff's first amended complaint to state claims.

A. Standard of Review

This Court reviews a trial court's decision on a motion to amend and a motion to strike for an abuse of discretion. *Frank W Lynch & Co v Flex Techs, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001), *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 5; 687 NW2d 309 (2004); *Phillips v Deihm*, 213 Mich App 389, 394; 541 NW2d 566 (1995).

B. Plaintiff's Federal Claims

Plaintiff contends that the circuit court abused its discretion in restricting her first amended complaint to state claims, thus, striking her 42 USC 1983 claims. Plaintiff sought leave to amend her complaint pursuant to MCR 2.118(A)(2), which provides that "except as provided in subrule (A)(1), a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave shall be freely given when justice so requires." MCR 2.118(A)(2).

Particularized reasons for denying a motion to amend include: (1) undue delay; (2) the movant's bad faith or dilatory motive; (3) repeated failures to cure deficiencies by amendments previously allowed; (4) undue prejudice to the nonmoving party; and (5) futility. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000). Seemingly, the circuit court limited plaintiff's amended complaint to state claims because of time and undue prejudice to defendants' ability to remove the claim to federal court; there was also confusion that was caused by plaintiff presenting three different proposed first amended complaints. The record reflects that the circuit court noted these particularized reasons and seemed to weigh this against the fact that plaintiff would not be prejudiced. There was confusion surrounding the claims in that the 42 USC 1983 claims were not specifically in the motion to amend plaintiff presented to the circuit court when requesting an amendment.

While it is true that leave to amend shall be freely given when justice so requires, MCR 2.118; *Terhaar v Hoekwater*, 182 Mich App 747, 751; 452 NW2d 905 (1995), the circuit court did not violate this rule in limiting plaintiff's amendment to state claims. Plaintiff's amended complaint filed on March 31, 2003, was different then the one presented in its motion for an amended complaint and the one it presented at the motion hearing. With respect to claims not raised in the motion, but argued at the hearing, these claims were not stated in writing with particularity, and were therefore not properly within the motion to amend the complaint. See MCR 2.119. The circuit court also preserved plaintiff's right to seek to amend to add federal claims once it had ruled on the pending motions for summary disposition or to bring another claim. And, the circuit court's final order was given with the understanding that it reserved adjudication of damages for the pending federal district court claims against defendants. The circuit court did not abuse its discretion in striking plaintiff's federal claims and only allowing the amended complaint to allege state claims, see *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997), citing *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992); B*en P*

Fyke & Sons v Gunter Co, 390 Mich 649, 658; 213 NW2d 134 (1973), particularly when defendants may have been prejudiced if the federal court claims were allowed and plaintiff suffered no prejudice.

Affirmed. [8]

/s/ Michael J. Talbot
/s/ Kathleen Jansen
/s/ Hilda R. Gage

[8] Lincoln Park has requested that sanctions be imposed against plaintiff for a vexatious appeal. MCR 7.216(C)(1) governs sanctions requested for a vexatious appeal. MCR 7.216(C)(1) indicates that a motion for sanctions must be filed pursuant to MCR 7.211(C)(8). And MCR 7.211(C)(8) provides that a request for sanctions must be made by motion; a brief on appeal is insufficient to request sanctions. There is no indication that Lincoln Park has separately filed a motion for sanctions at the appellate level. Moreover, no appropriate legal authority was cited to support sanctions. Therefore, Lincoln Park's request for sanctions is denied.